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No. 89-1958

In the Supreme Court of the United States

OCTOBER TERM, 1990

COLOWYO COAL COMPANY, ET AL., PETITIONERS

v.

MANUAL LUJAN, JR.,
SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners entered into leases to mine coal on federal land pursuant to a statute that provided for readjustment at twenty-year intervals of the terms of such leases "as the Secretary of the Interior may determine unless otherwise provided by law at the time of the expiration of such periods," 30 U.S.C. 207 (1970). The questions presented are:

1. Whether the property of petitioners was taken without due process of law or just compensation when the Secretary increased the royalties on the leases to conform to the law in effect at the expiration of a twenty-year period.

2. Whether the government's right to readjust the terms of a federal coal lease is waived if the government has provided the lessee with the proposed readjusted terms before the end of the twenty-year period specified in 30 U.S.C. 207(a), but has not finally ruled on the lessee's objections to those terms until after the end of the twenty-year period.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 895 F.2d 780. The order of the district court (Pet. App. 1b-2b) is unreported. The decisions of the Interior Board of Land Appeals (IBLA) are unreported. See C.A. App. 30-33, 69-71, 93-97, 118-122, 143-147, 186-189.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1990. Chief Justice Rehnquist granted petitioners an extension of time through June 7, 1990, to file their petition. The petition for a writ of certiorari was filed on June 7, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Colowyo Coal Company (Colowyo), Peabody Coal Company, North Antelope Coal Company, and Powder River Coal Company (collectively Peabody), obtained leases from the Department of the Interior under Section 7 of the Mineral Leasing Act (MLA), 30 U.S.C. 207, to mine coal on federally owned lands in various locations in Colorado and Wyoming.[1] The leases were all granted "for indeterminate periods upon condition of diligent development and continued operation of the mine or mines * * *." 30 U.S.C. 207 (1970). Section 7 also required the Secretary to condition the leases upon payment of a minimum production royalty of five cents per ton. *Ibid.* Finally, Section 7 provided that "at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine unless otherwise provided by law at the time of the expiration of such periods." *Ibid.*[2]

With respect to the leases at issue in this case, the most recent twenty-year periods ended in 1984-1986. See C.A. App. 10, 34, 73, 98, 123, 161. At that time, regulations pro-

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[1] Peabody obtained five leases, one in 1964, two in 1965, and one in 1966, which was later subdivided into two additional leases. Colowyo obtained one lease in 1924.

[2] Each of the leases contained provisions concerning readjustment. With some variation (see Pet. App. 5a n.1), they generally provided that the government reserved:

> [t]he right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period.

Pet. App. 4a.

vided that the government must issue a notice of intent to readjust prior to the expiration of the current twenty-year period. See 43 C.F.R. 3451.1(c)(1) (1984). Notice of the proposed terms had to be received by the lessee "as soon as possible after notice that the lease shall be readjusted, but shall not be longer than 2 years after such notice." 43 C.F.R. 3451.1(c)(2) (1984). The readjustment was generally effective 60 days after the lessee received the proposed terms. *Ibid.* The lessee could, however, appeal the terms of the readjustment, 43 C.F.R. 3451.2(d) (1984). See also 43 C.F.R. Pt. 4 (1984) (prescribing procedure for appeals to Interior Board of Land Appeals).

2. Prior to the twenty-year anniversary of each of petitioners' leases, the Bureau of Land Management (BLM), Department of the Interior, notified petitioners that it intended to readjust the leases. Pet. App. 6a. BLM's notification indicated that the adjustments were intended to reflect new leasing provisions enacted by Congress in the Federal Coal Leasing Amendments Act of 1975 (FCLAA), Pub. L. No. 94-377, 90 Stat. 1083. Pet. App. 5a. Section 6 of the FCLAA, 30 U.S.C. 207, which replaced Section 7 of the MLA, provided for a minimum royalty of 12.5% of the value of coal mined. It also continued to provide for readjustments to the leases at the end of the primary term of twenty years and every ten years thereafter.[3]

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[3] The amendment provides in relevant part:

> (a) A coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease. Any lease which is not producing in commercial quantities at the end of ten years shall be terminated. The Secretary shall by regulation prescribe annual rentals on leases. A lease shall require payment of a royalty in such amount as the Secretary shall determine of not less than 12½ per centum of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by

Both petitioners informed the BLM that they objected to the new terms. C.A. App. 20, 56, 83, 106, 131, 172. The BLM overruled the objections, and petitioners appealed to the IBLA. C.A. App. 23-29, 63-68, 89-92, 106-111, 137-142. The IBLA affirmed the BLM's decisions in relevant part. C.A. App. 30-33, 69-71, 93-97, 118-122, 143-147, 186-189.

3. Colowyo and Peabody sought review of the IBLA decisions in the District Court for the District of Columbia, which consolidated the two cases with a similar case filed by Western Fuels-Utah, Inc. Pet. App. 6a.[4] In a brief order, the district court granted the government's motion for summary judgment (Pet. App. 1b-2b), holding that the cases were "substantially identical" to *FMC Wyoming Corp.* v. *Hodel*, 816 F.2d 496 (10th Cir. 1987), cert. denied, 484 U.S. 1041 (1988), and *Coastal States Energy Co.* v. *Hodel*, 816 F.2d 502 (10th Cir. 1987). Pet. App. 1b.

4. The court of appeals affirmed. Pet. App. 1a-22a. The court held that the Secretary properly interpreted the FCLAA to require that the 12.5 per cent royalty rate be applied to petitioners' leases when the twenty-year readjustment period expired, even though those leases predated the FCLAA. Pet. App. 9a-16a. The court observed that the FCLAA's language amending Section 7 did not provide

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> underground mining operations. The lease shall include such other terms and conditions as the Secretary shall determine. Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended.

30 U.S.C. 207. The statute permits royalty rates lower than 12.5% only for "coal recovered by underground mining operations." The mines at issue in this case are surface mines. Pet. App. 5a.

[4] Western Fuels-Utah has filed a separate petition for certiorari, which is currently pending. See *Western Fuels-Utah, Inc.* v. *Lujan*, No. 89-1728.

an unambiguous answer to the question whether Congress intended the new minimum royalty rates to apply to pre-FCLAA leases. See Pet. App. 9a. However, the court found that other statutory provisions – in particular, a provision expressly referring to the applicability of the minimum royalty provisions of Section 7 to pre-existing leases – made Congress's intent in this regard clear. Pet. App. 10a-11a. The court's review of the statute's legislative history confirmed that the new minimum royalty rates were to apply to pre-existing leases when they were readjusted. Pet. App. 11a-13a.

With respect to petitioners' taking claim, the court noted that Section 7 of the MLA as originally enacted provided for readjustment of leases "as the Secretary * * * may determine, *unless otherwise provided by law*" at the expiration of the twenty year period. 30 U.S.C. 207 (1970) (emphasis added). The court found that the italicized phrase "certainly" could be understood to mean that Congress intended to reserve to itself "the power to provide by law for a specific readjustment," an interpretation that "has the indisputable advantage of not foreclosing the exercise of sovereign authority." Pet. App. 19a. Because the pre-1976 MLA, far from giving petitioners "a vested right to reasonable adjustments by the Secretary on an individualized basis indefinitely into the future," in fact put petitioners on notice that Congress could by statute raise the royalty at the expiration of any twenty-year period, no taking had occurred. *Ibid*.

The court also rejected petitioners' due process argument, holding that it would be inappropriate for a court to strike down Congress's choice of a 12.5% minimum rate simply on the basis of arguments that it was "unwise or improvident." Pet. App. 20a. Finally, the court rejected petitioners' claim that the readjustments in this case were not timely. Pet. App. 20a-22a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioners contend (Pet. 9-12) that the decision of the court of appeals in this case announced a "new legal principle" (Pet. 9) governing enforcement of contracts between the sovereign and private parties. Petitioners argue that the alleged "new legal principle" conflicts with this Court's decisions delineating the scope of Congress's authority to change the terms and conditions of a contract between the sovereign and a private party.

a. In *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986), this Court reiterated the basic principles governing contractual relationships between the United States and private parties. The Court stated:

> While the Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights, see *Perry v. United States*, 294 U.S. 330, 350-354 (1935); *Lynch v. United States*, 292 U.S. 571 (1934), we have declined in the context of commercial contracts to find that a "sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in" the contract. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982). Rather, we have emphasized that "[w]ithout regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Ibid.* Therefore, contractual arrangements, including those

> to which a sovereign itself is party, "remain subject to subsequent legislation" by the sovereign. *Id.*, at 147.

442 U.S. at 52. In *Bowen*, the Court noted the importance of heeding "this Court's often-repeated admonitions that contracts should be construed, if possible, to avoid foreclosing exercise of sovereign authority." 477 U.S. at 52-53.

Far from announcing a new principle of contract interpretation, the court of appeals in this case simply followed *Bowen* and numerous earlier precedents. The court noted that the statutory phrase, "unless otherwise provided by law at the time of the expiration of [any twenty-year] period," is echoed in petitioners' original, pre-FCLAA leases.[5] Pet. App. 17a-18a. Because it is certainly possible to interpret the statutory language to preserve "the sovereign power of the United States to change its laws" (Pet. App. 18a), and because any other interpretation could foreclose exercise of sovereign authority and would thus be "highly disfavored" (*ibid.*), the court correctly concluded that the statute should be read to permit Congress to enact new minimum royalty rates that can be applied when pre-existing leases are readjusted.

2. Petitioners also contend (Pet. 13-14) that the court of appeals misconstrued the statute by failing to give full effect to all provisions of the MLA in deciding that the

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[5] Quoting a phrase from the legislative history of an early version of the MLA dating back to 1914, six years before the MLA was enacted, petitioners repeatedly state that the terms of coal leases under the MLA were to be readjusted only "as necessary to meet materially changed conditions." Pet. 4 (internal quotations omitted). See also Pet. 5, 8, 13, 17. Although the need to adapt to "materially changed conditions" may well have been one reason why Congress included provision for readjustment of lease terms in the statute, the quoted language was not a part of the MLA as enacted. This language from a committee report cannot reasonably be construed to vest rights in petitioners that are beyond the power of Congress to alter.

FCLAA governed the lease adjustments in question. Petitioners argue that the lower court's failure violates this Court's "frequent injunction that two parts of a statute must be construed in harmony so that neither is subordinated to the other." *Ibid.* Petitioners' contention, which has been squarely rejected by the only other appellate court that has addressed the issue, see *FMC Wyoming Corp.* v. *Hodel*, 816 F.2d 496, 500-502 (10th Cir. 1987), cert. denied, 484 U.S. 1041 (1988), is meritless.[6]

The court of appeals carefully and methodically reviewed the provisions of both the MLA and the FCLAA in order to ascertain the effect of the FCLAA on the MLA. See Pet. App. 9a-16a. Indeed, the court expressly followed this Court's directive in *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988), that its construction of the statute must "look to the particular statutory language at issue, as well as the language and design of the statute as a whole." Petitioners present no reason for rejecting the court of appeals' analysis of Section 7's neighboring provision that plainly refers to the application of the new minimum royalty rates to pre-existing leases (Pet. App. 10a-11a), nor do they confront evidence to the same effect in the FCLAA's legislative history. See Pet. App. 11a-13a.

3. Petitioners renew their contentions that the application of the statutory minimum royalty to their leases constitutes a deprivation of property without due process of law and a taking of their property without just compensation. Pet. 16-18.

a. Petitioners' claim (Pet. 16) that a "stricter" standard of due process review should be applied to impairment by

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[6] The Court has recently denied certiorari in another case raising essentially the same issues, in which the Tenth Circuit, following *FMC*, denied claims indistinguishable from those urged by petitioners here. See *East Texas Steel Facilities, Inc.* v. *Lujan*, 110 S.Ct. 65 (1989).

the government of its own contractual obligations than to legislative action that impairs private contracts has no relevance to this case.[7] Petitioners' leases, as well as the MLA itself, made clear that new terms and conditions would be applied at twenty-year intervals in accordance with the law applicable at the time of readjustment. Therefore, the government's actions in full compliance with those provisions did not impair the obligation of any contract or deprive petitioners of any property interest, and this case does not raise any question concerning the appropriate standard of review when such an impairment is present.

Petitioners' "due process" argument therefore reduces to the claim that the FCLAA was an unwise exercise of Congress's power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3, Cl. 2. Congress's power under this clause is very broad. See *United States* v. *California*, 332 U.S. 19, 27 (1947); *United States* v. *San Francisco*, 310 U.S. 16, 29-30 (1940). As the court of appeals noted, the fact that petitioners believe the FCLAA to be "unwise or improvident" does not provide a basis for declaring it unconstitutional. Pet. App. 20a (citing *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955)).[8]

[7] This Court has reserved the question whether and under what circumstances such a heightened standard of review would apply. See *National R. Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, 470 U.S. 451, 471 & n.24 (1985).

[8] The MLA's minimum royalties of five cents per ton were in effect from 1920 until 1976. In enacting the FCLAA, Congress decided to replace this low, constant-dollar royalty with an *ad valorem* percentage royalty that would automatically increase federal revenues as the price of coal increased. The fact that a commission appointed to look into the matter (see Pet. 15-16) may have disagreed with Congress's decision does not render that decision unreasonable, much less violative of the due process clause.

b. Petitioners' taking claim is also without merit. To determine whether challenged government action constitutes a taking, a court must examine "the economic impact of the regulation, *its interference with reasonable investment backed expectations*, and the character of the governmental action." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1980) (emphasis added). Because the readjustments here took place in conformance with petitioners' leases, as well as with the MLA as originally enacted and long-settled law concerning the interpretation of government contracts, any investment-backed expectations with which the readjustments interfered could not have been "reasonable."[9] See *Bowen*, 477 U.S. at 55-56.

4. Petitioners finally argue (Pet. 18-20) that the decision of the court of appeals concerning the timeliness of the readjustments conflicts with the decisions of other courts of appeals that have construed the same provision of the MLA. Petitioners note that the same issue was presented in the companion petition for a writ of certiorari filed by Western Fuels-Utah. See note 4,[10] *supra*. In addition to suffering from the defects discussed in the government's brief in opposition in *Western Fuels-Utah*, petitioners' argument has an additional flaw. Unlike Western Fuels-Utah, which was not informed of the precise terms of its readjusted lease until shortly after the twenty-year anniversary date, petitioners were informed of the proposed terms of readjust-

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[9] A lessee who believes that an adjusted royalty rate was unreasonable or impaired its operations has the option of seeking a royalty reduction under 30 U.S.C. 209. Neither petitioner here has sought such a reduction. Their taking claim would therefore in any event be unripe. See *MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. 340, 351-353 (1986); *Hodel* v. *Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 297 (1981).

[10] We have provided a copy of our brief in opposition in *Western Fuels-Utah* to petitioners.

ment *before* their twenty-year anniversary dates. The *final* terms of readjustment were not determined prior to the anniversary dates only because petitioners' objections to the proposed terms had first to be considered by the BLM and their subsequent appeal adjudicated by the IBLA. Insofar as there was any delay in this case, therefore, it was due to an event entirely within petitioners' own control—*i.e.*, their decision to file objections and appeal the Secretary's determination. In any event, petitioners' claims are identical to those rejected by the only other circuit that has addressed the issue. See *FMC Wyoming Corp.* v. *Hodel*, 816 F.2d 496, 500 (10th Cir. 1987), cert. denied, 484 U.S. 1041 (1988); *Coastal States Energy Co.* v. *Hodel*, 816 F.2d 502, 504-505 (10th Cir. 1987). See also note 6, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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